In the United States Circuit Court of Appeals

For The Ninth Circuit

TACOMA RAILWAY & POWER COMPANY, a corporation,
Plaintiff in Error,

vs.

ELLING REMMEN,
Defendant in Error.

No 2424

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE.

This action was brought by the defendant in error to recover damages for injuries sustained by being struck by a street car while crossing the street car tracks of plaintiff in error, on South Yakima

Avenue in the City of Tacoma. The complaint alleges that "on or about December 7th, 1912, at about six P. M. of said day, the plaintiff was traveling southward on said South Yakima Avenue in the City of Tacoma, and upon arriving at about South Sixty-second Street plaintiff undertook to cross from the westerly to the easterly side of said avenue, and while plaintiff was upon said South Yakima Avenue, and in the exercise of due care on his own part, and endeavoring to pass from the westerly to the easterly side thereof, one of the street-cars of the defendant, which was being carelessly and negligently operated in a northerly direction on said South Yakima Avenue, *was so carelessly and negligently operated and handled by the employes of the defendant company in charge of the operation of said car that plaintiff was without warning run down, struck and injured by said car.*"

The only allegation of facts constituting negligence was the failure to give warning. The defendant in its answer denied the negligence complained of and affirmatively alleged contributory negligence on the part of the plaintiff in error, "in that while defendant's car was being operated on South Yakima Avenue, between 64th and 63d Streets, in the City of Tacoma, at a moderate and lawful rate of speed, plaintiff heedlessly, carelessly, recklessly, and unnecessarily placed himself in a position of great danger, to-wit, by walking or running across said street in close and dangerous proximity to defendant's car and striking and colliding

with said car; that plaintiff failed to exercise his mental faculties in any way to observe, escape, and avoid the risks and dangers of his position, which were open and apparent to him and could have been easily avoided; that he failed to take any care or precaution whatever to provide for his personal safety."

Plaintiff's version of how the accident occurred as incorporated in the Transcript of Record on pages 23 to 28, inclusive, is as follows:

"On the 7th day of December, 1912, I left my home at about half-past one o'clock and went downtown. I had sixty-five cents in money and paid five cents for car fare,—bought a glass of beer and then I bought fifty cents' worth of alcohol and then another glass of beer, at about five o'clock P. M. with my last nickel. I then started to walk home and was run down by a street-car. Plaintiff's Exhibits 1, 2 and 3 I recognize as photographs of South Yakima Avenue between 61st and 63d Streets. About the time I crossed 61st Street 'I seen a light that seemed like it was swinging on to the left,—striking to the left. I judged it to be on the Alki switch. They call it 65th Street switch on Yakima Avenue.' I thought the light was a car coming downtown, going in on to the switch. I was very close to the crossing or on it when I saw the light. I got a little further and a car came along at a good speed and passed me going from town, the same direction I was going. I might have been almost in the center of that block. Not any more. Just a little after she passed me I was about in the centre of the block, I heard a blast of the whistle because I took notice of it. I thought that was a car that was coming behind, a tripper, as I knew by the time of the night it was, and thought it was a signal to the car that swung in

first onto the switch for her to stop and wait until that tripper came up. When I heard the whistle I was halfway between the fence and 61st Street. I walked down until I got to a place where the sidewalk stops, at a place I marked 'X' on the photograph. *I started to walk across the street to the left as I could not go further on the sidewalk, and there was an orchard and the fence in front of me. As I started to cross the street I thought I heard something. I was satisfied that I heard a car coming from the direction of town, going south. At that time I was off the end of the sidewalk, out in the street. I kept on walking and looked around to see if I could see the headlight of the car. 'I thought I seen the headlight and also other lights, but I tried to get my eyes trained on it, fastened upon the headlight of the street-car and I did not see anything so close to me that I thought there was any danger, and so I straightened up again and about that time I was on the street-car track and as I glanced ahead I saw a very short distance from me a street-car, and I thought I could make it, and I tried to jump like this, and at the same time she struck me and* she rolled me over and I landed on my arms underneath. I looked southward all the time I was walking on the sidewalk and saw no street-car up to the time I started to turn out across the street. There was a street light at the place I turned to go across and a path at that point. A street light is marked 'X' on the Exhibit 3. 'XX' shows location of Alki switch on Exhibit 3. Plaintiff's Exhibit One shows where I walked south on the sidewalk until I got to the fence that stands out in the street a good many feet, and passed the parking, and there is a well-trodden path over and across from here to here, indicating.

When I looked towards the north, thinking I heard a street-car I was between the sidewalk and the end of the fence, started off the sidewalk. I

was walking across 'over to * * * aiming to get to that sidewalk over there on the other side.' I do not remember anything further until two policemen picked me up in the car at the Interurban Depot. Someone said, Is he drunk? I said, I am not drunk; I am hurt. I was taken to the hospital and stayed there for seven weeks,—was attended by Dr. Love, surgeon for the defendant. I I cannot do any work. Can walk possibly a block without a cane, but it is an effort, a very hard struggle."

CROSS-EXAMINATION.

(By Mr. OAKLEY.)

"The company took care of me at their expense. I was laid off for a few days before this accident, sick. I was canvassing for razor sharpeners for a few days before the accident. I have been taken to the police station in the patrol at different times for being intoxicated. It must be four and one-half miles from where I left 15th Street to the place where I was injured. It is a block from 61st Street to the fence. As I got to 61st Street I thought I saw a swinging light on the switch. I did not see any car, but the light must have been from the car. *I did not see a car at any time coming from the south, 'until she was as close as you are to me.' My view was obstructed by the orchard and the fence.*

Q. Did you at any time from the time you went out back of that fence out into the street, look to see whether a car was coming from that direction or not?

A. No, sir. I looked the other way as I thought that I heard a car coming up the other way.

Q. Where were you when you looked for the car coming the other way?

A. I was leaving the sidewalk to go out into the street.

Q. You were leaving this cement sidewalk?

A. The end of the cement sidewalk, yes, sir. Then I looked down towards Tacoma and thought I saw a headlight.

A. I tried to be sure of it and kept on walking and then turned around up the other way as I thought that car was not close enough to hurt me anyhow, and then I got my eye on this other car.

Q. When did you hear the blast of the whistle?

A. Probably one-half way between 61st Street and the fence.

Q. Where did that come from?

A. It sounded from the south, Alki switch.

Q. You heard the blast of a whistle halfway between 61st Street and the fence? A. Just about.

Q. Then you knew the car was coming?

A. I thought the car was going to stay there on account of another car coming up.

Q. You knew what the blast of the whistle of a street-car means? A. I thought it meant to stop.

Q. Did you ever hear a street-car give a whistle when it was going to stop?

A. For another car behind it.

Q. Why did you look towards the city when you heard the whistle at Alki switch?

A. I thought there was a tripper behind the one coming on south. I thought the car was coming and was going to stay there on account of another car coming up. I thought the whistle meant to stop. I looked towards the city when I heard the whistle at Alki switch, because I thought there was a tripper behind the one coming on south.

Q. You did not pay any attention at all to the whistle? A. I did, sir.

Q. What did you do?

A. I looked for the car coming.

Q. Did you look in the opposite direction?

A. I did, sir, because I thought this meant for the car coming from the opposite direction.

Q. What kind of a whistle?

A. Just one short blast. I think the edge of the fence is twelve feet from the street-car track.

Q. Where were you when you were hit by the street-car?

A. I must have been between the two tracks, and when the * * * I seen the car and made a jump and got just about to the east track there. When I first saw the street-car that struck me it was ten feet away, and I was about the middle of the car track. I was struck right opposite this fence. The right side of my body was struck by the car. I could not say it was the side or end or what part of the car struck me. I did not know anything about the fender of the car. I did not see any headlight on the car. After I left 38th Street it was raining a little drizzle."

Mr. Polley, one of plaintiff's witnesses, testified that he was walking along the street near the place of the accident, and testified: "The car was about 100 feet from the plaintiff when I first saw him. I yelled just as it struck him. Just before the car reached him I saw the plaintiff going from the sidewalk near the fence, which projects about 12 feet out. When I heard the car coming I turned around and saw that the car was about 100 feet from Mr. Remmen, who was coming onto the tracks. He was on the track when I turned

my head again,—just going to stop and step off the track. *I had no trouble in seeing or hearing the car.* He was looking towards 56th Street." This, we will state in passing, was in the opposite direction from that in which the car was coming.

Mr. Zimmerman, one of plaintiff's witnesses, testified that the front door of the car was partly open,—he could see the motorman looking back into the car and testified further on as follows:—(R. 33-34):

"When I first saw Mr. Remmen the car was anywhere from 100 to 125 feet from him. I thought he was waiting for the car. He was on the right side of the car,—'on the right side as you come down,—the proper place for anyone to wait for it.' I was seated two seats from the rear of the car, not counting the one that runs lengthwise of the car. The plaintiff was facing to the south when I saw him, what would be towards 61st Street. I could see the 'V' of his vest and his shirt front. From appearances the way he was standing he seemed to be looking towards the car. I could not see his head. I did not hear a whistle at any time. I could see a bright headlight ahead. I was looking at the motorman. I did not see Mr. Remmen move after the first time I saw him. I could not say whether it was the front or side of the car that hit him."

After the accident he was taken to a hospital by one of the city jailers, who testified as follows (R. 36):

"I am one of the city jailers and am acquainted

with the plaintiff. I saw the plaintiff at the Interurban Depot. We took him out of the car and took him into the city ambulance or patrol wagon up to the hospital. I assisted in getting him out of the car. He was intoxicated. I have seen him in the city jail perhaps four times for being intoxicated. I have seen him paralyzed drunk and have seen him to the extent of having delirium tremens. He has been in the city jail since the accident."

And Miss Erickson, the nurse who attended him, testified as follows (R. 36):

"I am a nurse in the Tacoma General Hospital, and was so employed on the 7th day of December, 1912. I saw plaintiff when he was brought in after the accident. I think he was intoxicated. He was very noisy and his breath smelled of liquor. He was boisterous. For about an hour or so I had trouble taking care of him."

And Dr. Love, the first physician to see him, said that plaintiff had been intoxicated. (R. 41-42).

Mr. Payne, the motorman in charge of the streetcar, testified (R. 37-40):

"I seen a man run out from the sidewalk; when I first seen him he was about eight feet from the car, from the side. He appeared as though he wanted to catch the car. I was inbound, this side of 64th street, between 64th and 63d streets, and when I seen him I tooted the whistle, and he started to step out and he struck the car somewhere about the center of the car. The street light was out at 63d street and I saw him when he come into the rays of the light of the car. 'I seen him come staggering through the mud towards the car and he struck, as near as I could tell by looking in the glass from ten to fifteen feet from the rear of the car, and went backwards into the mud, and then

he went out of my view in the glass and I stopped about a car and a half-length or two car-lengths from where he fell. The car did not stop at 64th Street, which is about 100 or 150 feet from Alki switch,—the car was traveling at about ten or twelve miles per hour. The car was about 50 feet long, with back vestibule on both ends with center posts, with two folding doors inside the entrance on both ends of this car. The doors were closed and hooked. I know positively the conductor tried to get out at Alki switch to get through the head end in order to put the trolley on and the doors were hooked and I did not open them. The doors were opened last at Fern Hill when I hooked them there. The curtains obstructed the view of all passengers who could not see into the vestibule. The curtains pull down on the inside of the car and the curtains are used to keep the light out from reflecting on the window so you can see ahead and see around. If these curtains are up the light would reflect on the windows and you could not see past the windows. It is absolutely necessary to have the curtains pulled down. I could not see where the conductor was on account of the curtains, but I could hear the register ringing. He was collecting fares. I was not looking back into the car after leaving 64th Street. I was looking straight ahead. The front slide window was down. There were people standing at 64th Street but we did not stop, I let the car following us pick them up. This car was three or four car-lengths behind us. When Mr. Remmen was struck our car had gone about three-quarters of a block beyond 64th Street, and at the point in front of Mr. Barrett's house. When I first saw Remmen he was staggering towards the car. To the right of the car in the street. He was out in the traveled road about six or eight feet from the car track. I was then about a car-length from him when he came out of the road onto the track when I first saw him. I then started to stop. I blew the whistle as soon as I

saw him. There is a mirror which is fastened on the side of the vestibule of both ends. On both ends of the cars which have double ends, set at an angle so that a motorman can look into it and see everything at the rear of the car within six or eight feet from the car. I saw Mr. Remmen through this mirror hit the car and take a couple of staggering steps and then fall out of my view. There are step lights on the car, one in front and one back of the car. These lights show everything up so you can see everything between the mirror and the rear light on the step. The car had fenders on both ends. If a man was struck by one of these fenders it would pick him right up. Mr. Remmen was not struck by a fender. After I saw him hit the side of the car I stopped immediately, jumped out of the car and ran over to where he was. I was the first one there. He was lying on his back in the mud, about four feet or five feet from the track. I stooped over to pick him up and his breath smelled strongly of liquor. When I stopped the car the front end of the car was at about 63d Street, and he was about two car-lengths back from 63d Street. About in front of Barrett's house. Mr. Barrett telephoned from his house for the city ambulance. The headlight in the car was lighted at the time and in good condition."

Mr. E. J. Beacher testified as follows (R. 42-43):

"On the 7th day of December, 1912, I was living at Parker Street on the Spanaway line and was a passenger on the car on the night of the accident. I got on at Fern Hill and was standing on the back platform next to the entrance and as we passed 64th Street, I looked out and looked ahead to see where we were. I was intending to get off at 61st Street, and just as I looked out I saw a man very near the side of the car, and a second later he was up against it and when we hit him

it turned him around a couple of times, and he lit on his back in the mud, about the middle of the street. He was still standing when we passed him. I was right on the back platform, right at the entrance. When I first saw the plaintiff he was right alongside of the car and then within two or three feet of it. The front end of the car had passed him. The car went about 100 feet after Mr. Remmen fell. I had lived within four blocks of this place for about two years and am familiar with the location of everything there. Mr. Remmen struck the side of the car about halfway back and after the rear end had passed him he fell. I saw him just as he lit in the mud. The car was traveling fifteen miles per hour, not more. Mr. Remmen fell about 100 or 150 feet from 63d Street. I then rode on the car to 61st Street and got off."

We call the court's attention particularly to plaintiff's Exhibits 1, 2 and 3, which are photographs showing the street at the point of the accident. The defendant operated a single track car line at this point and as shown by the above exhibits a fence projected out into the street some considerable distance from the cement walk; this fence, together with an orchard which it enclosed, obstructed the view of pedestrians on that side of the street to the south. Plaintiff's contention is that he was walking south and upon coming to this fence started to cross the muddy road to the opposite side of the street, without looking to the south to ascertain whether or not a car was approaching. Defendant's witnesses, including a city police officer and his daughter, testified that the accident occurred nearly a block south of this corner,

in front of the police officer's house. Defendant's Exhibit "B" is a map showing the exact measurements of all material points involved in the controversy.

At the close of the evidence plaintiff in error made a motion for a directed verdict, in favor of the defendant, on the several grounds as shown on page 49 of the Record, which motion was overruled, after which the case was submitted to a jury, which returned a verdict for the plaintiff in the sum of $4750.00. Defendant thereafter made a motion for a new trial which was overruled, and this Writ of Error was thereupon obtained.

ASSIGNMENTS OF ERROR.

I.

The Court erred in refusing to give defendant's requested instruction as follows:

> "You are instructed to bring in a verdict in favor of the defendant."

For the reason that the evidence failed to disclose any negligence on the part of the defendant company, and showed conclusively that the plaintiff was guilty of contributory negligence.

II.

The Court erred in refusing to grant defendant's motion for a directed verdict in favor of the defendant on the following grounds therein set forth:

1. That the evidence has failed to disclose any negligence on the part of the defendant company; the evidence has failed to show that the car was being operated at an excessive and unlawful rate of speed.

2. That the evidence fails to show any grounds for the submission of the case to the jury on the ground of the last clear chance. It is not an issue in this case, and there is no evidence to show that the motorman in charge of the car in controversy failed to exercise ordinary care after he discovered the plaintiff's dangerous position on the track, or near the track.

3. The evidence shows that the plaintiff himself was negligent in not using his senses in any way whatever to ascertain the approach of defendant's car; that he failed to either look or listen or otherwise inform himself as to whether a car was approaching at the time he stepped upon the track, if he did step upon the track; that, had he looked, he could have seen the car, and was guilty of contributory negligence in failing to look or listen.

III.

The Court erred in refusing to grant defendant's motion for a judgment notwithstanding the verdict, for the reason that the verdict was contrary to the instructions and was not based upon sufficient evidence to support the same; that the

evidence failed to disclose any negligence on the part of the defendant company, and showed that the plaintiff was guilty of contributory negligence.

IV.

The Court erred in overruling defendant's petition for a new trial on the grounds therein set forth.

V.

The Court erred in refusing to give defendant's requested instruction number nine as follows:

"You are further instructed that if the plaintiff thought he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff and he cannot recover, and your verdict must be for the defendant."

For the reason that said instruction correctly states the law applicable to the facts, and the Court refused and neglected to give an instruction embodying the same principle of law, and the jury were left without proper guidance, and defendant was thereby deprived of a fair trial.

VI.

The Court erred in refusing to give defendant's requested instruction number ten, as follows:

"You are instructed that if the plaintiff failed

to look and listen, and stop, if necessary, or to take any reasonable precaution whatever to ascertain whether a car was coming upon the track of the defendant company, then and in that event it was negligence upon the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous distance of the plaintiff."

For the reason that said instruction correctly states the law applicable to the facts, and the Court refused and neglected to give an instruction embodying the same principle of law, and the jury were left without proper guidance, and defendant was thereby deprived of a fair trial.

ARGUMENT.

PLAINTIFF IN ERROR CONTENDS THAT THE DEFENDANT IN ERROR WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN WALKING UPON THE STREET CAR TRACKS UNDER THE CIRCUMSTANCES SHOWN BY THE EVIDENCE IN THIS CASE.

In the statement of the case hereinabove set forth the testimony material to the determination of the questions involved has been called to the Court's attention and we will not repeat the same to any extent. If we accept defendant in error's version of the case it must be considered that when he left the sidewalk his vision was obscured by a fence and an orchard which extended several feet out into the street, and he could not see along the track in the di-

rection from which the car was coming which struck him. He knew that a car was coming from that direction and did not look that way, but rather to the opposite direction. He paid no attention to the blast of the whistle which he heard from the car coming from the south.

"Q. When did you hear the blast of the whistle?

"A. Probably one-half way between 61st street and the fence.

"Q. Where did that come from?

"A. It sounded from the south, Alki switch.

"Q. Then you knew the car was coming?

"A. I thot the car was going to stay there on account of another car coming up.

"Q. You know what the blast of the whistle of a street car means?

"A. I thot it meant to stop.

"Q. Why did you look toward the city when you heard the whistle at Alki switch?

"A. I thot there was a tripper behind the one coming on south. I thot the car was coming and was going to stay there on account of another car coming up. I thot the whistle meant to stop. I looked towards the city when I heard the whistle at Alki switch because I thot there was a tripper behind the one coming on south.

"Q. You did not pay any attention at all to the whistle?

"A. I did, sir.

"Q. What did you do?

"A. I looked for a car coming.

"Q. Did you look in the opposite direction?

"A. I did, sir. Because I thot this meant for the car coming from the opposite direction.

"Q. What kind of a whistle?

"A. Just one short blast. I think the edge of the fence is 12 feet from the street car track."

It cannot be said then that he did not know that a car was approaching on the track coming from the south, because he said himself that he knew the car was on the track,—he heard one short blast of the whistle, but instead of looking in the direction from which he knew the whistle came, he looked in the opposite direction, and said he thot he saw a street car a great many blocks from him towards the city. His only excuse for not paying any attention to the warning blast of the whistle, was that he thot it meant for the car to stop.

We have heretofore called the Court's attention to the fact that the only allegation of negligence on the part of the defendant company alleged in the complaint, was its failure to give warning, and we submit to the Court that the above testimony of the plaintiff himself shows that he had warning of the fact that a street car was coming from the south, because he specifically stated in a number of places

in his testimony shown in the Record that he heard the whistle of a car coming from that direction.

It would seem unnecessary in the light of this evidence to go into any lengthy discussion to satisfy the Court that the defendant in error was guilty of contributory negligence in walking out from behind an obstruction after having heard the blast of a whistle of a street car, which he knew was coming from the south, without looking toward the south or otherwise using his senses after he had passed the obstruction, to ascertain whether or not the car from which he knew the blast of the whistle came, was in the vicinity of the place which he was attempting to cross. He was not crossing the street at any crossing place. The exhibits show too conclusively the character of the street at this place for anyone to honestly entertain the opinion that this was a crossing used by the public. The testimony shows that the road was in a wet and muddy condition, impassable to anyone who did not wish to flounder around in the mud. The headlight of the street car was burning. There was no allegation and no proof offered to show that the car was traveling in excess of any speed ordinance of the city, or that it was traveling at any dangerous or excessive speed. The evidence, on the contrary, shows conclusively that the car was being operated at a very moderate rate of speed.

The Courts have in many cases held that a person is guilty of contributory negligence (a) *where be-*

fore going upon street car tracks he fails to exercise his senses to discover the approach of a car, (b) where he so carelessly looks or listens that he does not see an approaching car plainly visible for some distance, (c) where he looks only when some distance from the track and does not look again before attempting to drive upon the track, (d) where he emerges suddenly from behind a standing car or other object which obstructs his view and suddenly goes upon the track.

Christensen v. Union Trunk Line, 6 Wash. 75, 32 Pac. 1018.

Helber v. Spokane St. Ry. Co., 22 Wash. 319, 61 Pac. 40.

Criss v. Seattle Elec. Co., 38 Wash. 320, 80 Pac. 525.

Coats v. Seattle Elec. Co., 39 Wash. 386, 81 Pac. 830.

Davis v. Railroad Co., 47 Wash. 301, 91 Pac. 839.

Skinner v. Tacoma R. & P. Co., 46 Wash. 126, 89 Pac. 488.

Helliesen v. Seattle Elec. Co., 56 Wash. 278, 105 Pac. 458.

Borg v. Spokane Toilet Supply Co., 50 Wash. 204, 96 Pac. 1037.

Dimuria v. Seattle Transfer Co., 50 Wash. 633, 97 Pac. 657.

Fluhart v. Seattle Elec. Co., 65 Wash. 291, 118 Pac. 51.

Slipper v. Seattle Elec. Co., 71 Wash. 279, 128 Pac. 233.

Armstrong v. Spokane & Inland Empire Ry., 71 Wash. 624, 129 Pac. 379.

Stueding v. Seattle Elec. Co., 71 Wash. 476, 128 Pac. 1058.

Bardshar v. Seattle Elec. Co., 72 Wash. 200, 130 Pac. 101.

Mey v. Seattle Elec. Co., 47 Wash. 497, 92 Pac. 283.

Harder v. Matthews, 67 Wash. 487, 121 Pac. 983.

Beeman v. Puget Sound Traction, Light & Power Co., 37 Wash. Dec. 107, 139 Pac. 1087.

Bowden v. Walla Walla Valley Ry. Co., 137 Wash. Dec. 144, 140 Pac. 549.

Brown v. P. S. E. Ry., 76 Wash. 214, 135 Pac. 999.

In *Criss vs. Seattle Electric Company*, 38 Wash. 320, 80 Pac. 525, *supra*, plaintiff was struck by a street car while walking diagonally across the track at a crossing of business streets in the City of Seattle, driving a team of horses before him, in the evening after dark. The testimony showed that he saw and heard a street car approaching down a steep grade one block away before he started to cross the track. There was nothing to prevent his looking back and seeing the car as it approached, but the testimony showed that he paid no attention

to the car until it was upon him and too late to get out of the way. The Court, in holding plaintiff to have been guilty of contributory negligence in failing to pay any attention to the car when knowing of its approach, said:

"He had every opportunity to see the car in the dark. The motorman had no opportunity to see the respondent until he came within the rays of the headlight. Under these circumstances, we think there is no escape from the conclusion that the respondent's own negligence contributed to the injury."

In *Mey vs. Seattle Electric Company* 47 Wash. 497, 92 Pac. 283, *supra*, a pedestrian was held guilty of contributory negligence precluding a recovery in walking on a street car track in a city where cars were constantly passing, at a point where the sidewalk and part of the street was fenced off or taken up with building operations, where there was room, every few feet, for him to get off of the track to allow a car to pass, and he failed to keep on the lookout for cars coming behind. In that case the Court said:

"It seems plain that it was the duty of the appellant, while traveling in close proximity to this track in a place where he testifies he knew that cars were passing at short intervals, to have exercised the ordinary caution of noticing, when he passed those points where there was not room for both man and car, whether there was any car which was liable to injure him. *According to the testimony, the track was on an open, paved street where the slightest observation would have discovered the approach of a car. Not having exercised this ordinary*

caution, we think the plaintiff was undoubtedly guilty of contributory negligence."

The cases of *Bork vs. Spokane Toilet Supply Co.*, 50 Wash. 204, 96 Pac. 1037, *supra*, and *Dimuria vs. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, *supra*, involve collisions between vehicles and pedestrians, but it is submitted that there is no reason why the law announced in those cases should not apply to the case at bar. It is a matter of common knowledge that street cars travel faster and are stopped with more difficulty than are vehicles drawn by horses, and for that reason pedestrians should be charged with greater care to avoid a collision with street cars than with other vehicles.

In the Borg case a pedestrian was crossing a city street diagonally in the middle of the block, and was struck by a delivery wagon. He saw the wagon approaching at six or eight miles an hour as he stepped from the curb, but paid no further heed to it, supposing it would keep on its course. There were no other vehicles in the street, and he met the wagon at right angles, while the same was crossing to the other side of the street. In holding the pedestrian guilty of contributory negligence, the Court said:

"Under these facts there can be no question that the driver of the laundry wagon was guilty of gross and inexcusable neglect; but we see no escape from the conclusion that the appellant was equally negligent, though perhaps the consequences of his neglect were not likely to prove so serious to others. The speed of the laundry wagon did not exceed six or eight miles per hour; there were no other vehicles in

the street to distract or bewilder the appellant; *he was in full possession of all his mental faculties, though apparently utterly oblivious to his surroundings. Both parties had equal rights in the street, and each rested under the same obligations to look out for his own safety and the safety of others. Had the appellant been the superior force in this instance, causing injury to the respondent or to some third person, there could be no question as to his negligence.*"

In the Dimuria case a pedestrian was run down by a team at a crossing. It appeared that he held an umbrella over his head in such a position as to prevent his seeing the approaching team, and neither before nor while crossing the street did he look in either direction for teams or vehicles. If he had done so he could have seen the team. The Court, in holding the plaintiff guilty of contributory negligence as a matter of law, said:

"There is no evidence that the respondent, before or while crossing Jackson Street, looked in either direction for teams or vehicles, or that he took any precaution for his own safety. *It was just as much his duty to do this as it was the duty of the driver to exercise care in avoiding accident. Pedestrians and teams have not any superior rights the one over the other at street crossings. They each have a common right to use the street, and in its exercise are equally bound to employ care for their personal safety. Barker vs. Savage, 45 N. Y. 191, 6 Am. Rep. 66; Borg vs. Spokane Toilet Supply Co., ante p. 204, 96 Pac. 1037.*

"From all the evidence we are compelled to hold that the respondent was guilty of contributory negligence, as a matter of law, in failing to look for approaching teams or to take any other precaution

for his personal safety; that the trial Court erred in denying appellant's motion for a non-suit; that the defect in respondent's case was not cured by evidence subsequently admitted; and that the appellant is now entitled to have its motion granted on this appeal."

The case of *Skinner v. Tacoma Railway & Power Co.*, 46 Wash. 122, 89 Pac. 488, *supra*, it is submitted is squarely in point. There a pedestrian 81 years old was held guilty of contributory negligence as a matter of law in stepping, on a dark night, in front of an approaching street car ten feet away, with its headlight burning, where a car bound in the opposite direction had passed and he knew that the cars were accustomed to meet there, where the approaching car was in open view for a considerable distance, while he was picking his way slowly across the mud and water in the street, without either hearing or seeing the car. In that case the Court said:

"There certainly can be no doubt that the respondent was guilty of contributory negligence when he deliberately walked in front of appellant's car. The respondent knew that the cars usually met upon that block. He was familiar with their running time. He saw the south-bound car pass. The night was dark, no lights nearby except the light of the car. Yet he carelessly walked upon the track within ten feet of an approaching car with all its lights burning. *He stepped directly into the rays of the headlight of the car. There was nothing to obstruct his view. We think there can be no dissenting opinion that this was negligence which caused his injury. The trial Court should have, therefore, refused to submit the case to the jury. Coates v.*

Seattle Elec. Co., 39 Wash. 386, 81 Pac. 830; *Criss vs. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Anson v. Northern Pac. R. Co.*, 45 Wash. 92, 87 Pac. 1058."

In *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, a pedestrian was struck at night at a crossing, by a well-lighted street car. She testified that just a moment before stepping on the track she looked east, and saw no car and heard no bell. It appeared that if plaintiff had looked as she said she did she must have seen the lighted car about 40 feet east of the crossing, going at a speed of ten miles an hour, the speed at which the consensus of opinion of the witnesses fixed the approach of the car. Whether or not the gong was sounded was a disputed question of fact. Respondent had lived upon the car line for some eight months, and knew that cars passed there frequently in both directions. In holding plaintiff to have been guilty of contributory negligence, the Court said:

"*We cannot understand how one looking for a car can fail to see a lighted car with its headlight throwing on the track ahead of it, and only forty-two feet away. The physical facts of the situation are a unit in showing respondent could not have used ordinary care in attempting the crossing. If she looked she must have seen the car, or else she gave such an indifferent and casual glance as was of no value to her in determining whether or not a car was approaching. In either event she was not using ordinary care.* The car was there with its lights burning, and such a look as would be given by an ordinary prudent person would have located it. *Pedestrians in crossing the tracks of a street railway in the*

daytime or in the night-time, knowing as respondent knew that the crossing was one where cars frequently passed, must use their senses to apprise them of danger, if any; they cannot heedlessly and carelessly cross the track, and throw the entire burden of their safety upon the motorman of any approaching car. The rights of the pedestrian and those of the street railway are equal. Their duties are reciprocal. Neither has the exclusive right of way; each must have due regard to the rights of the other.

"It is urged by respondent that, if it should appear that she attempted the crossing without looking and without listening, such failure is not contributory negligence, in law; citing *Roberts v. Spokane St. R. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184, and other cases from this court, in which it is held that failure to look and listen before crossing the tracks of an electric railway in a public street, where the cars have not the exclusive right of way, is not negligence *per se. Such is undoubtedly the rule here, but such a rule does not mean that one can heedleshly and carelessly cross the track without using his senses for his protection; nor does it mean that those who have eyes to see, but see not, and ears to hear, but hear not, are exercising due care.* In determining the question of contributory negligence, due care or ordinary prudence is the only known test. What would be due care under certain circumstances would not be due care under other and different circumstances; and in determining this question this court has refused to predicate its answer alone upon the fact that it did not appear that the person about to cross the track looked or listened, and say such failure of itself alone constitutes negligence in law. Other facts existing and present and affecting the situation must be given their due weight in determining the question of contributory negligence. In other words, it is not alone, Did the pedestrian look and listen? and, upon answering that question in the

negative, say it is negligence *per se*, and there can be no recovery. But the test is, Did the pedestrian, under all the circumstances, use such a degree of care, caution and prudence as an ordinary, prudent, and careful pedestrian would use under like circumstances?; and, in answering such test, this court has in a number of cases held that the failure to look and listen was a fact to be considered in determining whether or no there was contributory negligence as a matter of law. *Skinner v. Tacoma Railway & Power Co.*, 46 Wash. 122, 89 Pac. 488; *Mey vs. Seattle Elec. Co.*, 47 Wash. 497, 92 Pac. 283; *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 67 Pac. 657. The same rule has been applied to the drivers of wagons in crossing the track. *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 830; *Davis v. Coeur d' Alene & Spokane R. Co.*, 47 Wash. 301, 91 Pac. 839; *Helber v. Spokane St. Ry. Co.*, 22 Wash. 319, 61 Pac. 40. The Roberts case cites an authority for the rule therein announced: *Robbins v. Springfield St. R. Co.*, 165 Mass. 30, 42 N. E. 334, and *Shea v. St. Paul City R. Co.*, 50 Minn. 395, 52 N. W. 902. An examination of the Massachusetts and Minnesota cases will show that the announcement of such a rule was never intended to be construed as holding that failure to look and listen was not a circumstance to be considered in determining the question of contributory negligence, as a matter of law. We refer to a number of such cases subsequent to the Robbins case."

And, after an exhaustive review of the authorities of Massachusetts and Minnesota, the court concludes:

"Cases might be multiplied holding a like rule. We have, however, confined our citations to those states following which this court first pronounced

the rule in the Roberts case, and our purpose in doing so is to make clear that this rule in the Roberts case does not announce a rule of conduct that may be used as a measuring stick in all cases, irrespective of the facts, which must alone determine its proper announcement.

"In the present case, it conclusively appears to us that, *if the respondent looked as she says she did, she must have seen the car, then only forty-two feet away. If she did not look, under all the attendant circumstances, she was not using due and ordinary care.* In either case she was guilty of contributory negligence, and she cannot recover."

In a concurring opinion, Gose, J., adds:

"There is a photograph in the record, the accuracy of which is not disputed, which shows that the car which struck the respondent could be plainly seen, from the place where the accident occurred, for a distance of about five hundred feet. There must of necessity be reciprocal duties upon the pedestrian and the street railway company. *The track itself is a danger signal, and the pedestrian cannot be absolved from using the care which ordidary prudence demands. Under the circumstances admittedly present in this case, the act of the respondent in starting to cross the track was gross negligence.* The verdict of a jury will not be permitted to control physical facts. In concurring, I assume that there was competent evidence from which the jury might find that the motorman did not ring the bell after leaving Summit Avenue, *but it does not follow that the respondent could step in front of a well-lighted, moving car so near her that she could not withdraw her foot in time to avoid being struck by it, without being guilty of such negligence as to preclude a recovery. If she can recover in this case, a right of recovery could not be denied her if she had been a second later*

and had been injured in colliding with the body of the car."

In *Fluhart v. Seattle Electric Company*, 65 Wash. 291, 118 Pac. 51, the plaintiff started to cross the street from his house to the opposite side of the street for the purpose of reaching the barn where he kept his horses. He walked across the street until he was six feet from the street car tracks, at which point he looked for a car, but, seeing none, he started on across the track without looking again, and was struck by a car, which he testified he never saw. The court in holding the plaintiff guilty of contributory negligence, as a matter of law, in failing to exercise his faculties to discover an approaching car before stepping upon the tracks, said:

"From this evidence and the undisputed situation it unquestionably appears respondent walked too close to the track after he saw the approaching car, or at least after he could have seen it in the exercise of ordinary care. *The fact that the motorman operated the car at a dangerous and unlawful rate of speed, although negligence, would not entitle respondent to a recovery if he was also negligent and his contributory negligence was the proximate cause of the accident.* If, as he says, he looked west toward the approaching car when he was half-way from the curb to the track, he did so when he was within seven feet of the track. Thereafter he could not have proceeded more than two or three ordinary steps. He had not reached the track when struck. It is unreasonable to accept the theory that he could see to the top of the hill at Queen Anne Avenue to the east, and yet, within two or three steps of the track, could not see far enough west, aided by a brilliant headlight, to observe that the car would

probably strike him before he reached the track, as he 'was moving right along.' If the fog was so dense he could not see an approaching headlight, in time to avoid being overtaken, while walking only two or three steps, he was inexcusably negligent and reckless in 'moving right along' toward the track without using his other senses to learn existing conditions and assure himself of safety.

"In principle this case does not materally differ from the rule announced by this court in *Skinner v. Tacoma R. & R. Co.*, 46 Wash. 122, 89 Pac. 488; *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, and *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471. Respondent was not at a street crossing, although but a few feet distant therefrom. If it was too foggy for him to see a car he should have realized it would be too foggy for a motorman to see him before he unexpectedly appeared upon or near the track. When he approached the track, the duty of exercising due care rested upon him. The street was not thronged with pedestrians, vehicles, or cars which might distract and confuse him. There were no pedestrians other than himself at the immediate scene of the accident, and the offending car was the only vehicle then shown to be upon the street. *Being familiar with the location, respondent should have been able to apprise himself of the approach of the well-lighted car over an unobstructed street, and could have done so had he exercised ordinary care and prudence. There was neither necessity nor excuse for stepping in front of the car, even though it was approaching at an unlawful speed. Negligence on the part of the appellant did not relieve respondent from the duty of exercising care and avoiding contributory negligence on his part.* Although respondent says he did not see the approaching car, it is manifest he could have observed it, as he did see the further track was clear as far as the hill at Queen Anne Avenue. Instead of looking west after looking east, and before pro-

ceeding, he walked right on and was struck before turning his head."

* * * *

"In the Skinner case, *supra*, the plaintiff, a man 81 years of age, was held guilty of contributory negligence as a matter of law by reason of the fact that on a dark night he stepped in front of a well-lighted approaching car. *The physical and undisputed facts in this case indisputably show respondent must have done substantially the same act, by stepping too near the track in front of a rapidly approaching and well-lighted car. Evidence of physical facts making it certain a pedestrian must have seen, or could have seen an approaching car had he looked, renders unavailing his unsupported statement that he did look, but could not see. Oral statements, although undisputed, must yield to undisputed physical facts and conditions with which they are irreconcilable. From the physical facts and respondent's evidence, it is apparent he recklessly, carelessly and negligently walked too near the approaching car, and that in so doing he was guilty of contributory negligence.*"

We call the court's attention particularly to the case of *Beeman v. P. S. T. L. & P. Co.*, 37 Wash. Dec. 107, 139 Pac. 1087, decided by the Supreme Court of the State of Washington, April 15th, 1914, —a case almost parallel with the one in issue. In that case the "plaintiff approached a crossing on one of the streets in the city of Seattle. When about to step from the sidewalk he looked up the street and saw a street car about 450 feet away. The car was coming toward him and was moving at a rate of speed alleged to be and which the jury found to be approximately thirty miles per hour. The headlight of the car was lighted. The cross-

ing was muddy,—plaintiff was engaged in picking his way across the street when he was struck by the car and injured." The court after referring to several decisions from other courts, used the following language:

"Coming to our own cases, we cannot escape the logic of the holding of this court in the case of *Johnson v. Washington Water Power Co.*, 73 Wash. 616, 132 Pac. 392:

'It is clear that the car was much nearer the appellant when he entered the street and when he looked the second time, than he estimated it to be; and while he may have concluded that he had plenty of time to cross in front of it, he did not in fact have sufficient time, and did not verify his estimate by taking a look immediately before he entered the place of danger. His injury was clearly, therefore, contributed to by his own negligence. * * * By stopping at any time before he reached the railway track, the appellant would have been in a place of safety, and for one in his situation, knowing as he must have known had he looked in the direction of the car that it was almost upon him, to stop before attempting to cross the track would have been the exercise of only ordinary prudence and care. A motorman has the right to assume that a person on the street will exercise such care to avoid injury, and he may lawfully act on that assumption, until the conduct of the person warns him to the contrary.'

"This is in line with what has been said in *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, where the liability of the street railway companies to a pedestrian who should have seen an approaching car was considered. It was there contended that the injured party was justified in attempting to cross a street without looking and

without listening, under the authority of the case of *Roberts v. Spokane St. R. Co., supra.* The rule was admitted, but the court said:

'Such a rule does not mean that one will heedlessly and carelessly cross the track without using his senses for his protection; * * * What would be due care under certain circumstances would not be due care under other and different circumstances; and in determining this question this court has refused to predicate its answer alone upon the fact that it did not appear that the person about to cross the track looked or listened, and say such a failure of itself alone constitutes negligence in law. Other facts existing and present and affecting the situation must be given their due weight in determining the question of contributory negligence. In other words, it is not alone, Did the pedestrian look and listen? and upon answering that question in the negative, say it is negligence *per se*, and there can be no recovery. But the test is, did the pedestrian, under all the circumstances, use such a degree of care, caution, and prudence as an ordinary, prudent and careful pedestrian would use under like circumstances; and in answering such test, this court has in a number of cases held that the failure to look and listen was a fact to be considered in determining whether or no there was contributory negligence as a matter of law. * * * The *Roberts* case cites as authority for the rule therein announced; *Robbins v. Sprinfield St. R. Co.*, 165 Mass. 30, 42 N. E. 334, and *Shea v. St. Paul City R. Co.*, 50 Minn. 395, 52 N. W. 902. An examination of the Massachusetts and Minnesota cases will show that the announcement of such a rule was never intended to be construed as a holding that failure to look and listen was not a circumstance to be considered in determining the question of contributory negligence as a matter of law. We refer to a number of such cases subsequent to the *Robbins* case.'

"When respondent was about to step on the track, the car must have been only a few feet away, with its head light burning, and it would seem that his responsibility should be measured by the rule laid down in these cases and those cited in the *Helliesen* case. Then, too, it seems impossible to distinguish this case from the case of *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488, for the real question is not to be resolved by reference to the fact that respondent saw the car when four hundred and fifty feet away and walked blindly under the cloak of a presumption; but, rather, should he have seen the car when he stepped on the track, considering its immediate proximity, and the facts and circumstances then existing and immediately preceding. To hold otherwise, would be to say that a pedestrian, having knowledge, is not bound to sense the possibilities that attend known facts and may go at will, relieved of responsibility. Nor do we understand that this doctrine is denied in the *Richmond* case. It is there said:

'Of course, it can be said that he was required to use his senses and exercise such care as a man of ordinary prudence would be expected to exercise under such circumstances.'

"What is the meaning of 'such circumstances?' Certainly it does not mean that a man who knows that a car is approaching is to be bound by the same rule as one who does not know it, and who, under the facts, is not necessarily bound to know it."

The court held plaintiff guilty of contributory negligence and reversed the judgment of the lower court with directions to dismiss the action.

In the case of *Bowden v. Walla Walla Valley*

Ry. Co., decided by the Supreme Court of the State of Washington, April 23rd, 1914, 37 Wash. Dec. 144, 140 Pac. 549, the court said:

"The testimony of respondents is to the effect that on January 26th, 1913, a bright, sunny day, and about 3:40 P. M., they approached a crossing where the collision occurred, driving about 20 miles per hour. That the top of the automobile was up and the side curtains on the left hand side; that when about 150 to 175 feet away from the crossing they looked up and down the track but saw no car coming, and heard no whistles or other signals from approaching cars; that they did not look again, but reduced the speed of the automobile to about 15 miles per hour, drove onto the crossing, and that as they reached the track, a car, seen then for the first time, came upon them from the left, hitting the automobile at about the front seat."

And in holding the plaintiff guilty of contributory negligence, the court continued:

"The driver of an automobile approaching such a crossing as the one in this case, must make reasonable use of his senses to guard his own safety, and a failure to do so is negligence. Such a person cannot take a last look at 150 to 175 feet distant from the crossing and then shut his eyes and go blindly forward. While we shall not attempt to say within what distance respondents should have looked for an approaching car before attempting to cross, the law does require that such a look must be taken within such a distance as to enable one to ascertain whether or not there is an approaching car in sight. *Beeman v. P. S. T. L. & P. C.*, 37 Wash. Dec. 107, and cases cited there. Had respondents taken such precaution this accident would not have happened."

And in the case of *Brown v. P. S. E. Ry., supra,* the court held the plaintiff guilty of contributory negligence for driving out from behind an express van which obstructed his view of an approaching street car, out upon the street car tracks, where he collided with the car.

In *Harder v. Matthews,* 67 Wash. 487, 121 Pac. 983, the court held a pedestrian guilty of contributory negligence precluding recovery in walking from behind an express wagon which obstructed her view and in stepping in front of an approaching automobile, without seeing it, notwithstanding the fact that the automobile was being driven at a rate of twenty-five miles per hour. The court said:

"It is apparent that Mrs. Harder was guilty of negligence which caused her injury. She was attempting to cross a busy street at a place where pedestrians were not supposed to cross. She was looking in a direction nearly opposite to the direction she was going. She walked, no doubt, rapidly, for she was hurrying to catch a car. *She emerged from behind an express wagon into the path of vehicles without looking for approaching vehicles. Her negligence is manifest. * * * For a much stronger reason, when she walked from behind the express wagon, where she could not see approaching vehicles and where drivers thereof could not see her, and where she knew that vehicles were likely to approach, it was her plain duty, in the exercise of ordinary care in emerging therefrom, to look in the direction she was going.* If she had done this she would have seen the defendant and no doubt have avoided the injury. Her own negligence prevents her recovery, even though the auto was being driven at a rate of twenty-five miles per hour."

In *Steuding v. Seattle Elec. Co.*, 71 Wash. 476, 128 Pac. 1058, the court held a pedestrian guilty of contributory negligence in passing behind a standing street car onto the opposite track without using his senses to ascertain the approach of a car—citing therein many cases from this and other courts. This court used the following language in the above case:

"It has been held in other jurisdictions with similar unanimity that one who passes behind a standing car where there is a parallel track without using his senses, will not be allowed to recover if he is injured by an approaching car. The same rule obtains where the traveler takes observation from a point where he knows that his view is restricted and then heedlessly passes into the zone of danger."

In the recent case of *Bardshar v. Seattle Electric Co.*, 72 Wash. 200, 130 Pac. 101, the facts are almost parallel to those in the case at issue, and we quote the following part of the decision to show how strikingly similar the two cases are:

"The automobile was proceeding south on First Avenue from Pike Street, approaching Union Street, one block to the south; it was passed by one of respondent's cars on the west or southbound track. This southbound car stopped on the south side of Union Street to take on awaiting passengers. The chauffeur, desiring to cross First Avenue at Union Street, slowed down his automobile and drove on behind the southbound car, reaching Union Street. He made the turn to the east, as required by an ordinance of the city, by going to the south of the street intersection. At this point he was behind the standing car a dis-

tance variously estimated by appellant's witnesses from fifteen to thirty feet. As the front wheels of the automobile ran onto the west rail of the east or northbound track it was hit by a car coming north and received the damage complained of. The chauffeur testified that, from the time the southbound car passed him in the middle of the block between Pike and Union, there was no car ahead of him and nothing to obstruct his view, and that he could see down First Avenue as far as Pioneer Square, some eight blocks away. His examination then continues:

'Q. How many cars did you see coming? A. I didn't look down that way. Q. You didn't look to see if there were any cars coming? A. No, I did not. Q. You did not observe whether there were any cars coming? A. No. Q. If you had looked you could have seen this car coming? A. I suppose so. * * * Q. Now, you say that you were fifteen or twenty feet, something like that, from the car that was standing still? A. The southbound car? Q. Yes, was it standing still when you started to go across? A. Yes. Q. And it blanketed your view? A. Down First Avenue. Q. Yes? A. Yes. Q. Now, you knew that the cars frequently operated up and down those tracks? A. Yes, I knew that. Q. And that the outbound car come on the opposite track? A. Yes. Q. How far is it between the inbound car track and the outbound track; four or five feet, isn't it? A. Yes, about that. Q. The front of your machine then, if you made a right angle turn and was crossing directly up Union Street, would be on the upbound track before you could see down First Avenue around the standing car? A. Yes.'

"Upon these facts, and others of similar import, testified to by the chauffeur and the other occupants of the automobile, we think the lower court was right in holding they established contributory negligence."

Under the circumstances we submit that respondent was grossly negligent. A glance of the eye would have informed him that the car was approaching. If he had used his senses he would not have run directly in front of a moving car to be struck by it. Reasonable minds guided by a sense of fairness can reach but one conclusion,—that respondent's own gross negligence was the sole cause of his injuries.

"*Nature has provided two senses for personal protection, the use of either of which might have given plaintiff warning of the approaching car; for it is of common knowledge that a trolley car in motion makes, by friction with the track, a noise more or less audible, and that, as the wheel of the trolley pole runs along the wire overhead, a whirring sound is caused, increasing in intensity with the speed of the car.* One of the plaintiff's witnesses testified that the car was going at a high rate of speed, and, this being assumed, the whirr must have been noticeable. *If the plaintiff had listened he might have heard both of these sounds.* So, also, a car in motion has the electric current at work, and, after dark, the electric lamps are lighted. *It taxes credulity to believe that, if the plaintiff had either looked or listened, he would not have become aware of the proximity of the car.*"

Quinn v. Brooklyn City Ry. Co., 57 N. Y. Supp. 544, 546.

The great weight of authority sustains the rule that a pedestrian is guilty of contributory negligence if, before crossing street railway tracks, he *fails* to exercise his senses to discover the approach of cars operated by electricity.

Birmingham Railway etc. Co. v. Oldham, 141 Ala. 195; 37 So. 452.

McGee v. Consolidated St. Ry. Co., 102 Mich. 107; 60 N. W. 293.

Wilder v. Detroit United Ry., 147 Mich. 537; 111 N. W. 100, and cases cited.

Hickey v. Railway Company, 60 Minn. 119; 61 N. W. 893.

Terien v. St. Paul City Ry. Co., 70 Minn. 532; 73 N. W. 412.

Timler v. Philadelphia Rapid Transit Co., 214 Pa. 475; 63 Atl. 824.

Manos v. Detroit United Ry., 130 N. W. 664.

McGee v. St. Joseph Ry. etc. Co., 133 S. W. 1194.

Cain v. St. Ry. Co., 97 Ga. 298; 22 S. E. 918.

Indianapolis St. Ry. Co. v. Zaring, 71 N. E. 270; 33 Ind. App. 297.

Young v. St. Ry. Co., 148 Ind. 54; 44 N. E. 927; 47 N. E. 142.

Beem v. Elec. Ry. Co., 104 Ia. 593; 73 N. W. 1045.

Ames v. Ry. Co., 120 Ia. 640; 95 N. W. 161.

Burns v. St. Ry. Co., 71 Pac. 244; 66 Kan. 188.

Kansas etc. Co. v. Gallagher, 68 Kan. 424; 75 Pac. 469.

Hebee v. Light & Power Co. (La.), 35 So. 251.

Snider v. Ry. Co., 48 La. Ann. 12; 18 S. 695.

Dieck v. Ry. Co., 51 La. Ann. 626; 25 S. 71.

Cenedo v. Ry. Co., 52 La. Ann. 2149; 28 S. 287.

Moore v. Lindell R. Co., 176 Mo. 583; 75 S. W. 672.

Ries v. Transit Co., 179 Mo. 1; 77 S. W. 734.

Riska v. Ry. Co., 180 Mo. 168; 79 S. W. 445.

Petty v. Ry. Co., 179 Mo. 666; 78 S. W. 1003.

Brown v. Ry. Co., 68 N. J. L. 618; 54 Atl. 824.

McGrath v. Ry. Co., 66 N. J. L. 312; 49 Atl. 523.

Hageman v. St. Ry. Co., 74 N. J. L. 279; 65 Atl. 834, and cases cited.

Thompson v. Buffalo R. Co., 145 N. Y. 196; 39 N. E. 709.

Baxter v. Electric Ry. Co., 190 N. Y. 439; 83 N. E. 469.

Pinder v. Railroad Co., 173 N. Y. 519; 66 N. E. 405.

Smith v. Ry. Co., 29 Ore. 539; 46 P. 136, 780.

Wolf v. Ry. Co., 45 Ore. 446; 72 Pac. 329.

Boring v. Union Traction Co., 211 Pa. St. 594; 61 Atl. 77.

Watkins v. Union Traction Co., 194 Pa. St. 564; 45 Atl. 321.

Tesch v. Ry. & Light Co., 108 Wis. 593; 84 N. W. 823.

Goldman v. Ry. & Light Co., 123 Wis. 168; 101 N. W. 384.

Beerman v. Union R. Co., 24 R. I. 275; 52 Atl. 1090.

Price v. Rhode Island Co., 28 R. I. 220; 66 Atl. 200.

Dunn v. St. Ry. Co., 186 Mass. 316; 71 N. E. 557.

Blackwell v. St. Ry. Co., 193 Mass. 222; 79 N. E. 335.

Fitzgerald v. Ry. Co., 194 Mass. 242; 80 N. E. 224.

Hooks v. Light & Power Co., 147 Atl. 700; 41 So. 273.

Berger v. Rapid Transit Co., 141 Fed. 120.

* * * * * *

And where one *looks* or *listens*, but *fails* to see or hear a car which is plainly visible for some distance, he is nevertheless guilty of contributory negligence.

Willis v. Boston N. St. Ry. Co., 89 N. E. 31.

Russell v. Minneapolis St. Ry. Co., 86 N. W. 346.

Farese v. North Jersey St. Ry. Co., 69 Atl. 959.

Stassen v. New York City Ry. Co., 102 N. Y. S. 468.

Madigan v. Third Ave. R. Co., 74 N. Y. S. 143.

Newcomb v. Metropolitan St. Ry. Co., 74 N. Y. S. 858.

Nugent v. Philadelphia Trac. Co., 37 Atl. 206.

Mathews v. Rhode Island Co., 77 Atl. 865.

So, also, a pedestrian is guilty of contributory negligence, as a matter of law, where he looks only when he is some distance from the track and does not look again for the approach of the car before stepping upon the tracks.

Wecker v. Brooklyn etc. R. Co., 120 N. Y. S. 1020, and cases therein commented upon.

Denver City Tramway Co. v. Cobb, 164 Fed. 41.

Glynn v. New York City Ry. Co., 110 N. Y. S. 836.

Ayers v. Forty-Second St. etc. Ry. Co., 104 N. Y. S. 841.

Morice v. Milwaukee Elec. R. & Light Co., 129 Wis. 529; 109 N. W. 567.

Lynch v. Third Ave. R. Co., 85 N. Y. S. 180.

Klough v. Interurban St. Ry. Co., 92 N. Y. S. 733.

Healy v. United Traction Co., 101 N. Y. S. 331.

Solomon v. New York City Ry. Co., 99 N. Y. S. 529.

Pittsburgh Ry. Co. v. Cluff, 149 Fed. 732.

Merritt v. Foote, 128 Mich. 367; 87 N. W. 262.

Ross v. Metropolitan St. R. Co., 113 Mo. App. 600; 88 S. W. 144.

Paul v. United Ry. Co., 152 Mo. App. 577; 134 S. W. 3.

Krant v. Public Service Ry. Co., 75 Atl. 165.

Davis v. Detroit United Ry. Co. (Mich.), 127 N. W. 323.

ASSIGNMENTS FIVE AND SIX.

The Court erred in refusing to give defendant's requested instruction No. 9, as follows:

"You are further instructed that if the plaintiff thought he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff and he cannot recover and your verdict must be for the defendant.

The Court erred in refusing to give defendant's requested instruction No. 10, as follows:

"You are instructed that if the plaintiff failed to look and listen and stop if necessary, or to take any reasonable precaution whatever to ascertain whether the car was coming upon the track of the defendant company, then and in that event it was negligence on the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous proximity to the plaintiff."

These two instructions correctly state the law applicable to the facts involved in the case and the court neglected to give any instructions embodying the same principles of law, and the jury were left without proper guidance in the matter.

The first of the above instructions is applicable and should have been given for the reason that the defendant in error himself testified that he heard a car whistle and thot he was not in danger of being struck by that car, so he looked in the opposite direction and was in fact struck by the car that whistled. The jury should have been given this instruction for their guidance in arriving at their verdict in respect to this particular phase of the case.

The second instruction above complained of is, we submit, a correct statement of the law, and while the court gave instructions which embodied the same phase of the law as set forth in the above instruction, it did not cover all phases of it, and we submit that the refusal of the court to instruct the jury as requested by the defendant contains reversible error.

Relying upon the belief that this court will follow the decisions of the Supreme Court of this state in so far as they are not in conflict with the decisions of this court, we submit that as a matter of law the defendant in error was guilty of such contributory negligence as to bar his recovery and we respectfully request the court to reverse the judgment with direction to dismiss the action.

Respectfully submitted,

JOHN A. SHACKLEFORD,

F. D. OAKLEY,